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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

JAMES RAY HAGGARD, Petitioner

vs.

THE STATE OF TEXAS, Respondent

On Discretionary Review from the
Court of Appeals from the Ninth Judicial District
of Texas at Beaumont
Appellate Cause Nos. 09-17-00319-CR & 09-17-00320-CR

Appealed from the 75th Judicial District Court
of Liberty County, Texas
Cause No. CR30744

RESPONDENT'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT GRANTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a), Texas Rules of Appellate Procedure, a complete list of all parties is set out below.

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW the State of Texas, by and through her Assistant District Attorney, Stephen C. Taylor, and files this Respondent's Brief in response to Petitioner's Brief in this cause.

STATEMENT OF THE CASE

This is an appeal from convictions for SEXUAL ASSAULT OF A CHILD and INDECENCY WITH A CHILD BY SEXUAL CONTACT. On February 19, 2014, in Cause No. CR30744, Appellant was charged by Indictment with SEXUAL ASSAULT OF A CHILD (Count I) and INDECENCY WITH A CHILD BY SEXUAL CONTACT (Count II). (CLRK. REC. I – 2 – 3) (CLRK. REC. II – 2 – 3). On August 14, 2017, in Cause No. CR30744, Appellant appeared before HON. MARK MOREFIELD, Presiding Judge in the 75th Judicial District Court of Liberty County, Texas, for trial by Jury. A Jury was empaneled and sworn.

In Cause No. CR30744 (Count I), the Jury found Petitioner **GUILTY** of SEXUAL ASSAULT OF A CHILD as charged in Count I of the Indictment. (CLRK. REC. I – 32) (RPTR. REC. V – 152 – 153). In Cause No. CR30744 (Count II), the Jury found Petitioner **GUILTY** of INDECENCY WITH A CHILD BY SEXUAL CONTACT as charged in Count II of the Indictment. (CLRK. REC. II – 32) (RPTR. REC. V – 153 – 154). Having elected for the Trial Court to assess punishment if found **GUILTY**, the Jury was discharged.

Petitioner stipulated that he was "one and the same" person convicted in the punishment enhancement allegations, Cause Nos. 15663 and F09010814-WL. (RPTR. REC. VI – 5 – 6). The Trial Court found the punishment enhancement allegations to be "**TRUE**" and assessed Petitioner's punishment in Cause No. CR30744 Count I at twenty-five (25) years in TDCJ-ID. (CLRK. REC. I – 33) (RPTR. REC. VI – 41). The Trial Court also assessed Petitioner's punishment in Cause No. CR30744 Count II at twenty-five (25) years in TDCJ-ID. (CLRK. REC. II – 33) (RPTR. REC. VI – 41). The Trial Court then **ORDERED** that the sentences assessed in Cause No. CR30744 Count I and Cause No. CR30744 Count II run **consecutively**. (RPTR. REC. VI – 41 – 42). Notice of Appeal was timely filed in each Count. (CLRK. REC. I – 39) (CLRK. REC. II – 38).

Prior to the commencement of trial, the following colloquy occurred between the TRIAL COURT, Prosecutor JOE W. WARREN, Prosecutor MATTHEW POSTON, and Defense Counsel KEATON KIRKWOOD. (RPTR. REC. III – 157 – 168).

THE COURT: On the record, STATE OF TEXAS vs. JAMES RAY HAGGARD. The Court was approached this morning with an oral motion by the State to allow testimony to be given and cross examination to proceed on a witness by the name of - -

MR. WARREN: SUZANNE DEVORE.

THE COURT: And to do this via FACE TIME?

MR. POSTON: That's correct, Your Honor.

THE COURT: And that procedure would be able to be displayed at least on the 60 or 65-inch TV that the Jury can view. Also, the witness could see the person asking questions, correct?

MR. WARREN: Correct.

THE COURT: And hopefully it will also be able to be shown on the monitors so the defense Counsel and the Defendant can see this testimony as well.

Whoever is asking questions would obviously have to approach the device that initiated this FACE TIME thing to ask questions so the witness could observe the questions; but at all times you're telling me the Jury will have full view of the witness, correct?

MR. WARREN: As long as [SUZANNE DEVORE] stays in front of the camera system she has up there which is whatever her device is, as long as she's in front of it we have got her face, Judge.

THE COURT: Can she be given instructions that that must occur?

MR. WARREN: Yes, sir, she can.

THE COURT: Now, this witness I understand to be an expert witness in the nature of a Sexual Assault Nurse Examiner.

MR. WARREN: That's correct.

THE COURT: She will be testifying with respect to what she did in her capacity as a Sexual Assault Nurse Examiner.

She is not a fact witness to any of the allegations the State has brought against the [Defendant]; only a fact witness as to what her examination entailed and what she gathered incident to that examination and apparently she's a part of the chain of custody on whatever it is she acquired during the course of that SANE exam.

MR. WARREN: That's correct.

THE COURT: MR. KIRKWOOD, I know that you made opposition to this under the SIXTH AMENDMENT Confrontation Clause.

MR. KIRKWOOD: And the FIFTH AMENDMENT Due Process, Judge, as well as I have a Court case from the Supreme Court that says this is inappropriate.

THE COURT: And this particular type of procedure is inappropriate?

MR. KIRKWOOD: Yes, sir.

THE COURT: What's the date on that Supreme Court case?

MR. KIRKWOOD: I have two, Judge, Maryland v. Craig, which is cited 497 U.S. 836 (1990) and then United States v. Yates, 438 F.3d 1307 (11th Cir. 2006).

THE COURT: Well, I think your first case was a situation where they put the witness behind a screen and asked questions of the witness.

We're not talking - - I mean that way the Jury would be deprived of viewing the witness' demeanor or expressions and other indicia of the reliability or lack of reliability that a face-to-face confrontation would otherwise supply.

It's the Court's understanding that the SIXTH AMENDMENT Confrontation Clause is designed to ensure the reliability of the evidence that's actually received, and the reliability of that evidence has to be tested through rigorous cross-examination.

It's the Court's opinion that anything that would have the chilling effect on the right of cross-examination would by its very nature be suspect but - -

MR. KIRKWOOD: If I may, Your Honor.

THE COURT: You may.

MR. KIRKWOOD: That case, Maryland v. Craig, came up with the Craig ruling; and then you have Yates in 2006. The reason in Yates, the Australian witness could not testify in Alabama is they were unwilling to travel.

The government asserted that the important public policy reasons for allowing them to testify utilizing two-way video conference for providing the fact-finder with crucial evidence expeditiously and justly resolving the case in ensuring that foreign witnesses can so testify.

The 11th Circuit held that these concerns were not the type of public policies that are important enough to outweigh the Defendant's rights to confront their accusers face-to-face.

My understanding of the Maryland v. Craig, what came out of that, Judge, was that - - let's see.

THE COURT: Counsel, I don't mean to interrupt; but I think what's crucial to a determination of the State's request is the function that this witness is going to provide in the case.

Now, if we're talking about a witness that is a fact witness to the point that that witness will be called upon to make an identification of the Defendant as the alleged perpetrator cross examination face-to-face I think is crucial; but here we're talking about an expert witness that is not going to be called upon to make any in-Court identification or is not going to be called upon to testify to any of the factual allegations contained in the indictment.

MR. KIRKWOOD: Judge, I don't think the Supreme Court differentiates between a State's witness. They have the power to subpoena or have them come.

[SUZANNE DEVORE] has chosen not to come. There is no public policy that alleviates what - - I believe even the 9th Circuit says they should be able to have confrontation face-to-face. In doing so you will set a precedent not only in this Court but all over, Judge.

The only time I have seen them allow someone not to be present is because of some type of medical issue or maybe they are out of country or something to that or in the military or something to that effect, but just because they don't want to come - -

THE COURT: I agree with you, Counsel; but those were witnesses as to the operative facts of the case. They were not a witness situated such as this witness and that is an expert witness.

Now, who is this witness associated with at the time? A hospital?

MR. WARREN: Yes, sir. I believe it was part of the Hermann Hospital group.

THE COURT: MR. WARREN, there is a procedure available to secure the presence of out of state witnesses.

Now, you represented to the Court that at all times this witness indicated her willingness to accept reimbursement of compensation for travel expenses and would actually appear in person; is that true?

MR. WARREN: That is true. I have IVAN PEARCE that has been in direct contact with her that can testify to that.

THE COURT: When did this change?

MR. WARREN: Friday.

THE COURT: Friday being - -

MR. WARREN: Three days ago.

THE COURT: The 11th, and today is August 14th. Obviously, you don't have time to secure an order from the appropriate Court in Montana to direct the witness to do anything.

MR. WARREN: Judge, it was 2 o'clock in the afternoon, between 1 [P.M.] and 2 [P.M.] when we even found out about it, Judge.

THE COURT: Well, the best authority is Stevens v. State, found at 234 S.W.3d 748 (Tex.App. - - Forth Worth 2007, no pet.). It's a no petition review by the Court of Criminal Appeals, but it found that the decision of the Court to allow or not to allow should be examined on an abuse of discretion standard.

This again constituted a fact witness that appeared by SKYPE or some other device similar to what is being proposed here. It went on to note the salutary effect of face-to-face confrontation includes the giving of testimony under oath.

I'm assured this will occur in this particular case. We won't allow any testimony not to be under oath by a person authorized to administer oaths. The opportunity for cross-examination.

The Court concludes the manner in which it's being proposed will not have a chilling effect on the right of cross-examination, the ability of the fact finder to observe demeanor evidence - - and you assure me that the witness will be instructed to stay in front of a TV that will be broadcast on a 60 to 65-inch TV for the Jury's consideration - - and the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence.

That is not an element in this case because this witness is an expert witness and will be testifying only to perhaps her training and then what she did incident to her sexual assault examination, right?

MR. WARREN: That's correct.

THE COURT: And then confirming evidence that was retrieved, marked, and sent along. In other words, she will be part of the chain of custody on evidence that the State proposes to admit.

MR. WARREN: [SUZANNE DEVORE] collected the SANE kit and submitted the SANE kit to the Sheriff's Department to put in the chain of custody to send it to the DPS lab along with everything else.

THE COURT: Of course, you will have your same burden of chain of custody through this witness as any other witness.

MR. WARREN: She is the only one that could actually do this one, Judge.

MR. KIRKWOOD: Again, Judge, my belief is that this can only happen with exceptional circumstances that outweigh or public policy that outweighs my Client's constitutional rights to confront the witness face-to-face here in the courtroom.

THE COURT: MR. KIRKWOOD, if this is anything other than an expert witness I think I would have to agree with you. I think the Texas cases also recognize that exceptional circumstances must exist to allow.

MR. KIRKWOOD: Will she be available for rebuttal or substantive recall?

THE COURT: Absolutely, but I haven't denied your request yet.

MR. KIRKWOOD: Yes, sir.

THE COURT: Should the Court grant the State's request, it has to be understood that [SUZANNE DEVORE] is going to have to be available, MR. WARREN.

MR. WARREN: Yes, sir.

THE COURT: Throughout the course of this trial. If MR. KIRKWOOD wants to recall her in his case-in-chief, then he cannot be deprived of that opportunity. We're going to have a real problem if that occurs.

MR. WARREN: The only problem we have, Judge, is the time difference of one hour if we are to start at 9 [A.M.] getting her up and running by 8 [A.M.].

THE COURT: I think MR. KIRKWOOD can let you know an hour in advance whether he intends to call her in his case-in-chief.

MR. WARREN: All we have to do is be able to set up.

THE COURT: I can't see MR. KIRKWOOD wanting to rely on her as a rebuttal because there would be nothing to rebut. It's the State's witness.

All right. Assuming that the manner in which this testimony will be presented is exactly as represented to the Court, that Counsel will have a full opportunity to observe the witness, the witness will be able to see the questioner, be it the State or the Defense Counsel, that the witness will at all times be in full view for the Jury's consideration as to demeanor, etc., and that the witness has no personal knowledge of any facts as alleged in the indictment and only testify as an expert witness as far as being a SANE examiner and what she did incident to that examination in identifying anything that she retrieved from the examination, the Court is going to allow the testimony in that manner.

MR. WARREN: That's what we're here to do, Judge.

THE COURT: One hiccup, and its problematic. There has also been several unpublished opinions on this particular issue. In the Court's opinion the manner in which it's going to be presented addresses the salutary concerns of the SIXTH AMENDMENT and Crawford v. Washington, 541 U.S. 36 (2004) right of confrontation.

MR. KIRKWOOD, your objection is **OVERRULED**. Let's be ready at 9:00 o'clock.

On Direct Appeal, Petitioner asserted in his sole ISSUE:

DID THE TRIAL COURT ERROR IN PERMITTING THE SANE TO TESTIFY, OVER [PETITIONER'S] OBJECTION, VIA FACEBOOK LIVE? IF SO, WAS THERE HARM?

On Direct Appeal, Petitioner summarized his sole ISSUE: The trial court erred in permitting the SANE to testify via Facebook Live because there was no important public interest for her to do so, nor was there the reliability of her testimony assured to override [Petitioner's] right to confront her. The Court cannot determine beyond a reasonable doubt that the SANE testimony did not contribute to [Petitioner's] convictions. Accordingly, [Petitioner's] convictions should be reversed and remanded to the trial court for a new trial.

On Direct Appeal, Petitioner's argument in support of his sole ISSUE is set out in Brief for Appellant, pgs. 15 – 26. On Direct Appeal, the State's argument in opposition to Petitioner's sole ISSUE is set out in Brief for State, pgs. 26 – 35.

In Haggard v. State, Nos. 09-17-00319-CR & 09-17-00320-CR, 2019 WL 2273869 (Tex.App. - - Beaumont May 29, 2019, pet. granted) (mem. op. not designated for publication), the Ninth Court of Appeals stated:

> Even assuming without deciding that the Trial Court abused its discretion in allowing the SANE's testimony, the violation of the Sixth Amendment right of confrontation constitutes constitutional error that is subject to a harmless error analysis. Shelby v. State, 819 S.W.2d 544, 546 (Tex.Crim.App. 1991) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).
>
> When assuming harm under a Confrontation Clause issue, we apply a three-pronged test. Shelby, 819 S.W.2d at 547. First, we assume that the damaging potential of the cross-examination was fully realized. Id. Second, with that assumption in mind, we review the error by considering the following factors: the importance of the witness's testimony in the State's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting material points of the witness's testimony, the extent cross-examination was otherwise permitted, and the overall strength of the State's case. Id. Third, we determine whether the error was harmless beyond a reasonable doubt. Id.
>
> The SANE was an expert witness who testified about what M.W. reported to her, the findings from her examination of M.W., and the chain of custody regarding evidence the SANE obtained. After reviewing the entire record, we conclude that much of the SANE's testimony was cumulative of M.W.'s testimony, and the SANE was not a crucial identification or fact witness. The record demonstrates that the Trial Court permitted [Petitioner] to fully cross-examine the SANE. There was evidence introduced from M.W., L.B., and T.W., as well as from the forensic witnesses that corroborated the material points of the SANE's testimony, and the State's case was not dependent upon the SANE's testimony.

Because our review of the record shows the properly admitted evidence overwhelmingly established [Petitioner's] guilt, we conclude, beyond a reasonable doubt, that the admission of the SANE's testimony via live videoconferencing **did not** contribute to [Petitioner's] convictions. We OVERRULE ISSUE ONE. (slip op. at 17 – 19).

PETITIONER'S ISSUE

PERMITTING A KEY PROSECUTION WITNESS TO TESTIFY REMOTELY BY VIDEOCONFERENCE FROM MONTANA VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

RESPONDENT'S REPLY TO PETITIONER'S ISSUE

THE TRIAL COURT DID NOT ERR IN PERMITTING THE SANE TO TESTIFY VIA FACETIME FROM MONTANA IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT; AND IF THE TRIAL COURT DID ERR, SAID ERROR WAS HARMLESS.

ARGUMENT AND AUTHORITIES

One of the fundamental guarantees of life and liberty is found in the Confrontation Clause of the Sixth Amendment, which provides that: "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." **U.S. CONST. amend. VI**. "The primary object of the constitutional provision…was to prevent depositions or ex parte affidavits…being used against a prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242 – 243 (1895).

"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." Pointer v. Texas, 380 U.S. 400, 404 (1965).

[I]n speaking of confrontation and cross-examination, "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." Greene v. McElroy, 360 U.S. 474, 496 – 497 (1959). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair

trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." Pointer, 380 U.S. at 405. "[T]he confrontation guarantee of the Sixth Amendment…is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" Malloy v. Hogan, 378 U.S. 1, 10 (1964).

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - - a right to his day in court - - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by Counsel." In re Oliver, 333 U.S. 257, 273 (1948). "In a constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of Counsel." Turner v. Louisiana, 379 U.S. 466, 472 – 473 (1965). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. Barber v. Page, 390 U.S. 719, 725 (1968).

Confrontation: (1) insures that the witness will give his statements under oath - - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of the truth', (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. California v. Green, 399 U.S. 149, 158 (1970).

"I…emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress. [N]either the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States. Federal authority was never intended to be a 'ramrod' to compel conformity to non-constitutional standards." Id. at 171 – 172. (BURGER, C.J., concurring). "[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause. [T]he clause may be read to confer nothing more than a right to meet face-to-face all those who appear and give evidence at trial." Id. at 174 – 175. (HARLAN, J., concurring).

"Confrontation means more than being allowed to confront the witness physically. The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness." Davis v. Alaska, 415 U.S. 308, 315 – 316 (1974) (citations omitted).

The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. The right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51 – 52 (1987). The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by

forgetfulness, confusion, or evasion. The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. Delaware v. Fensterer, 474 U.S. 15, 21 – 22 (1985).

On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown - - and hence unchallengeable - - individuals. Long v. State, 742 S.W.2d 302, 321 (Tex.Crim.App. 1987) (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

In Coy v. Iowa, 487 U.S. 1012, 1016 (1988), four Supreme Court Justices believed that "the Confrontation Clause [of the Sixth Amendment to the United States Constitution] guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." However, two members of the Court who joined in the ultimate holding of the Coy opinion - - that in that case the procedure of placing a screen between the accused and the child witnesses while the children testified before the jury violated the accused's Sixth Amendment rights - - refused to conclude that the Confrontation Clause always required a "face-to-face" encounter between the witness and the accused. Justice O'Connor, writing for the concurrence, agreed that the accused's rights under the Confrontation Clause "were violated in this case." Id. at 1022. Nevertheless, in her opinion "[Sixth Amendment] rights are not absolute but rather may give way in *an appropriate case* to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." Id. (O'CONNOR, J. concurring).

In **reversing** and **remanding** in Coy, after holding that the use of this procedure **violated** the defendant's right to confront witnesses against him, we suggested that any exception to the right "would surely be allowed only when necessary to further an important public policy." Id. at 1014 – 1015; 1021. Justice Scalia, writing for the Court, stated "We leave for another day…the question whether any exceptions exist"…"to the irreducible literal meaning of the Clause: 'a right to *meet face-to-face* all those who appear and give evidence *at trial*.'" Id. at 1021.

After Coy, the Court of Appeals for New York reviewed an appeal concerning the validity and application of **Article 65** of New York Criminal Procedure Law which authorizes a trial court, under specified circumstances, in certain sex crime cases, to permit a child witness to testify from a testimonial room over live two-way closed-circuit television. People v. Cintron, 551 N.E.2d 561 (1990). **Article 65** was designed to further the aim of insulating child witnesses from the trauma of testifying in open court and also, under certain conditions, from having to testify in the presence of the defendant while, at the same time, fully preserving the defendant's constitutional rights. Id. at 564.

In analyzing the facial constitutionality of **Article 65**, we first discuss defendant's primary contention, based on Coy, that a defendant's constitutional right of confrontation permits nothing less than total eye-to-eye confrontation in defendant's physical presence. Defendant's argument, under his reading of Coy, is that **Article 65,** in permitting a witness to give televised testimony in defendant's absence, necessarily violates the constitutional right of confrontation, irrespective of the limitations on the permissible use of the procedures and the statutory provisions designed to minimize the extent of the infringement. Id. at 566.

We **do not** interpret Coy as establishing such a categorical rule and decline to adopt one under the State Constitution. Id. We interpret the holding in Coy…as permitting the use of closed-circuit television technology where: (1) an appropriate individualized showing of necessity is made and (2) the infringement on defendant's confrontation rights is kept to a minimum. Id. at 567. We conclude, therefore, that *face-to-face* confrontation with the defendant **is not** an absolute requirement under the Federal or State Constitution. Id. However, the Court of Appeals for New York **reversed** Cintron, finding that the trial court's subjective impressions…provide an insufficient basis for a factual finding [that the victim was a 'vulnerable child'] required to be predicated on "clear and convincing evidence." Id. at 571.

Shortly after Cintron was decided, the Supreme Court decided Craig, wherein the Court decided the question reserved in Coy: "Whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television?" Craig, 497 U.S. at 840. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. As we noted in our earliest case interpreting the Confrontation Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Craig, 497 U.S. at 845 (citing Mattox, 156 U.S. at 242 – 243).

The right guaranteed by the Confrontation Clause includes not only a "personal examination," but also "(1) insures that the witness will give his statements under oath - - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; and (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." Craig, 497 U.S. at 845 – 846 (citing Green, 399 U.S. at 158).

The combined effect of these elements of confrontation - - physical presence, oath, cross-examination, and observation of demeanor by the trier of fact - - serves the purpose of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. Craig, 497 U.S. at 846. Oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement.'" Id. at 847 (citing Green, 399 U.S. at 166).

"[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." Fensterer, 474 U.S. at 22. The word "confronted" as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant - - a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial. Craig, 497 U.S. at 849.

In sum, our precedents establish that the "Confrontation Clause reflects a *preference* for face-to-face confrontation at trial." Craig, 497 U.S. at 849 (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980)). A *preference* that "must occasionally give way to considerations of public policy and the necessities of the case." Craig, 497 U.S. at 849 (citing Mattox, 156 U.S. at 243). Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, **we cannot say** that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. Craig, 497 U.S. at 849 – 850.

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so. Craig, 497 U.S. at 850 (citations omitted).

In Craig, "Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation - - oath, cross-examination, and observation of the witness' demeanor - - adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." Craig, 497 U.S. at 851.

"These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition. We are therefore confident that the use of the one-way closed circuit television procedure, when necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." Id. at 851 – 852. "In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause." Id. at 857.

"The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a 'case-specific finding of necessity.' [T]he Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause **does not** prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." Id. at 857 – 858; 860.

Post Maryland v. Craig

In Gonzales v. State, 784 S.W.2d 723 (Tex.App. - - San Antonio 1990, pet. granted), the appellant contended that the trial court erred in permitting a child witness to testify by means of a closed-circuit television system, in contravention of his rights to confrontation and due process under both the federal and state constitutions. On June 28, 1988, the first day of trial, prior to any testimony being heard by the jury, the State moved to present the testimony of YOLANDA M. via closed-circuit television. After conducting a "hearing," the trial court judge granted the State's motion. No evidence was heard. Only the arguments of Counsel were advanced. Thereafter, the State began its case-in-chief but the trial was recessed before the child testified. Id. at 724.

On June 29, 1988, the very next day, the United States Supreme Court handed down its decision in Coy, holding that the federal constitutional confrontation clause required face-to-face confrontation. On June 30, 1988, as a result of Coy, the State filed a second motion to use closed-circuit television. Another hearing was conducted by the trial court. This time evidence was offered. At the close of the hearing, the appellant renewed his objections. They were overruled and the second motion was granted. Gonzales, 784 S.W.2d at 725.

The victim testified via closed-circuit television, and the appellant was convicted and sentenced to ninety-nine (99) years. In **reversing** and **remanding,** the Court of Appeals held that the statute the State depended on was inapplicable to the situation presented, stating "A defendant's core right of face-to-face confrontation with witnesses against him who appear at trial to testify cannot be so easily diluted." Id. at 728 – 729. The Court of Appeals stated that they were unable to declare beyond a reasonable doubt that the error in admitting the televised testimony was harmless. Id. at 729.

The Court of Criminal Appeals granted Discretionary Review in Gonzales v. State, 818 S.W.2d 756 (Tex.Crim.App. 1991), and **reversed** and **remanded** back to the Court of Appeals to address the appellant's other claims, stating "In Long, this Court suggested that the State Constitution afforded greater confrontational rights than those afforded under the Federal Constitution." Id. at 762 (citing Long, 742 S.W.2d at 309 n. 9). "Nevertheless, the State Constitution has *never* required that the accused and the witnesses against him come 'face-to-face' in the trial court in all situations. In fact, we have interpreted the State and Federal Constitutions as not requiring any type of confrontation (much less 'face-to-face' confrontation) between certain hearsay declarants and the accused at trial." Gonzales, 818 S.W.2d at 763 (citations omitted).

As the Court in Garcia v. State, 210 S.W.2d 574 (1948) recognized:

> "It is generally agreed that the process of confrontation has two purposes. The main and essential one is to secure the opportunity of cross-examination [but t]he granted right is not fixed or immovable…. Exceptions exist to its application, as evidenced by the receipt of evidence of dying declarations and res gestae statements of deceased persons and the reproductions of testimony given by witnesses where prior opportunity of cross-examination has been recorded." Id. at 579 (opinion on rehearing) (citations omitted).
>
> "Thus, like the Craig's court's interpretation of the Confrontation Clause, this Court has interpreted the right to confrontation under the Texas Constitution in light of important policy considerations such that, while finding face-to-face confrontation furnishes the greatest assurance of compliance with the Constitution we have not determined that such is the only method of guaranteeing the confrontation rights afforded by **Article 1, Section 10** of the Texas Constitution." Id. at 763 – 764.

"The Confrontation Clause provides simply that '[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him….' It is plain that the critical phrase within the Clause…is 'witnesses against him.' There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean." White v. Illinois, 502 U.S. 346, 358 – 359 (1992) (THOMAS, J., concurring in part).

The Sixth Amendment's Confrontation Clause "guarantees the defendant a face-to-face meeting with the witnesses appearing before the trier of fact." United States v. Rouse, 111 F.3d 561 (8th Cir.), cert. denied, 522 U.S. 905 (1997). "However, this right is not absolute and must accommodate the State's 'compelling' interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment.' 'Where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure' which preserves 'the essence of effective confrontation' - - testimony by a competent witness, under oath, subject to contemporaneous cross-examination, and observable by the judge, jury, and defendant." Craig, 497 U.S. at 851; 857.

In Marx v. State, 987 S.W.2d 577 (Tex.Crim.App. 1997), cert. denied, 528 U.S. 1034 (1999), child witnesses testified via two-way closed-circuit television, outside the appellant's physical presence and over his objection. "A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* when denial of such confrontation is necessary to further an important public policy and the reliability of the testimony is otherwise assured." Marx, 987 S.W.2d at 580 (citing Craig, 497 U.S. at 850).

"The requisite *necessity* to justify the use of such a special testimonial procedure in a child abuse case may be shown if the trial court determines that use of the procedure is necessary to prevent significant emotional trauma to the child witness caused by the defendant's presence. The requisite *reliability* of the child witness' testimony may be assured absent a face-to-face encounter through the combined effect of the witness' testimony under oath (or other admonishment, appropriate to the child's age and maturity, to testify truthfully), subject to cross-examination, and the factfinder's ability to observe the witness' demeanor, even if only on a video monitor." Marx, 987 S.W.2d at 580 (citing Craig, 497 U.S. at 856 – 858). "Applying these settled principles to the case at bar, we discern **no** Sixth Amendment violation in the…admission of the two-way closed-circuit testimony of [the two children]. Furthermore, the requisite reliability of the children's testimony was assured because they testified after promising to do so truthfully, they were subject to cross-examination, and the jury was able to observe their demeanor." Marx, 987 S.W.2d at 580 – 581.

"The question then becomes, do courts have the power…to authorize the use of televised closed-circuit procedures? The answer is '**YES**.' We have recognized that the courts have inherent power over 'the everyday administration of justice.'" Marx, 987 S.W.2d at 588 (citing Matchett v. State, 941 S.W.2d 922, 932 (Tex.Crim.App. 1996)), cert. denied, 521 U.S. 1107 (1997). "Moreover, the Legislature has directed that the courts 'control proceedings so that justice is done.'" **TEX. GOV'T CODE § 21.001 (b)**. "Hence, absent a constitutional provision, statute, or rule to the contrary, the trial court has the power to control the procedural aspects of a case. One of those procedural aspects is the manner in which witnesses will be required to testify." Marx, 987 S.W.2d at 588 (KELLER, C.J., dissenting).

In United States v. Gigante, 166 F.3d 75 (2nd Cir. 1999), cert. denied, 528 U.S. 1114 (2000), the appellant argued that the admission of a government witness' two-way, closed-circuit television testimony from a remote location violated his Sixth Amendment right "to be confronted with the witnesses against him." Prior to trial, the government made an application for an order allowing the witness to testify via closed-circuit television due to his illness and concomitant infirmity. Id. at 79.

Due to the witness' illness, the trial court judge permitted the witness to testify via two-way, closed-circuit television, basing his decision upon his "inherent power" under **FED. R. CRIM. P. 2** and **57 (b)** to structure a criminal trial in a just manner. Id. at 80. During his testimony, the witness was visible on video screens in the courtroom to the jury, defense counsel, the Judge, and the [appellant]. The witness could see and hear defense counsel and other courtroom participants on a video screen at his remote location. Id. The appellant argues that his Sixth Amendment right could only be preserved by a face-to-face confrontation with the witness *in the same room*. "[The 2nd Circuit] disagreed. While the use of remote, closed-circuit television testimony must be carefully circumscribed, the…order in this case adequately protected [appellant's] confrontation rights." Id.

"[T]he right to face-to-face confrontation is not absolute. The Supreme Court explained that '[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" Id. Here, "[The witness] was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [the witness] gave his testimony under the eye of [the defendant] himself. [The defendant] forfeited none of the constitutional protections of confrontation." Id.

In Gigante, "It forced [the witness] to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment…. Closed-circuit testimony also allowed [the defendant's] attorney to weigh the impact of [the witness'] testimony on the jury as he crafted a cross-examination. Two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. [A] trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." Id. at 81.

In Harrell v. Florida, 709 So.2d 1364, cert. denied, 525 U.S. 903 (1998), the State requested to introduce the testimony of the two robbery/burglary victims via satellite transmission. The State argued that satellite transmission was necessary because the two victims were unable to be physically present in the courtroom, both because of the distance between the United States and Argentina and because of health problems that one of the victims was experiencing. Over the appellant's objections, the trial judge agreed to allow the testimony via satellite. Harrell, 709 So.2d at 1367. The District Court of Appeals **affirmed**, holding that the admission of the live satellite testimony **did not** violate the defendant's right of confrontation. Id. at 1364. The issues on appeal are whether or not testimony via satellite in a criminal case violates the Confrontation Clause and, if so, whether the satellite procedure constitutes a possible exception. Id. at 1367.

"The State is urging this Court to conclude that the satellite procedure used in this case is the equivalent of physical, face-to-face confrontation. **We decline to make such a finding.** We are unwilling to develop a per se rule that would allow the vital fabric of physical presence in the trial process to be replaced at any time by an image on a screen. Perhaps the 'virtual courtroom' will someday be the norm in the coming millennium; for now, we do not conclude that virtual presence is the equivalent of physical presence for the purposes of the Confrontation Clause. Therefore, the satellite procedure can only be approved as an exception to the Confrontation Clause." Id. at 1368 – 1369.

"Our Court is mindful of the importance of today's decision. Yet, we are also mindful that our society, and indeed the world, is in the midst of the Information Age. Computers are the norm in American households and businesses; an infinite amount of information is available at our fingertips through the Internet; and satellite technology allows us to travel the world without ever leaving our living rooms. The legal profession has also benefitted from these technological innovations. Legal research that once took hours or days is now available in seconds through computer and Internet databases. Clients can reach their attorneys anywhere in the world through the use of cellular and video innovations. The list goes on and on." Id. at 1372.

"Indeed, our very own Court takes pride in the recent technological advancements that have been made. Oral arguments before the Court are broadcast live via satellite throughout the state. These same arguments can be viewed online, along with the parties' briefs. The Florida Supreme Court Website has received worldwide acclaim for opening up the courthouse doors to the general public. All of these steps provide greater access to the judicial system, which in turn increases public trust and awareness. That being said, it becomes quite clear that the courtrooms of this state cannot sit idly by, in a cocoon of yesteryear, while society and technology race towards the next millennium. Fortunately, the courtrooms of this state have not been idle, nor are they speeding at a reckless pace. Recent changes in the courtroom have included the use of audiotape stenographers as well as video transmission of first appearances, arraignments, and appellate oral arguments, just to name a few. We recognize that there are generally costs associated with change. Nevertheless, technological changes in the courtroom cannot come at the expense of the basic individual rights and freedoms secured by our constitutions. We are confident that the procedure approved today, when properly administered, will advance both the access to and the efficiency of the justice system, without compromising the expectation of the safeguards that are secured to criminal defendants." Id.

"Our nation's Constitution is a living document that has stood the test of time and change. This point is exemplified by the fact that our Constitution is still viable today - - some two-hundred-plus years after our country's birth. There is no way the founders of this nation could have foreseen the innovations that would take place throughout the country's lifetime - - changes that, up to this point, have included advances in communication, electricity, train, airplane, and automobile transportation, and even space exploration. Nor can we predict today the changes yet to come. But we can say with certainty that our Constitution, as well as this great nation, can endure any future changes while at the same time ensuring that individual rights and liberties will be upheld." Id.

In Stevens, 234 S.W.2d at 781 – 782, CLYDE WARD, the two-and-a-half-year-old victim's Grandfather, testified at trial via two-way closed-circuit television. At the time of trial, WARD was "seventy-five (75) years old; living in Castle Rock, Colorado; and, was suffering from heart problems. [T]he State proposed that WARD be allowed to testify via closed-circuit television. Prior to WARD's testimony, the State requested that the record reflect the following details concerning the physical set-up of the closed-circuit equipment being used to obtain WARD's testimony:

> [W]e have set up a system wherein there's a podium in the middle of the courtroom from which the attorneys can question the witness. There's a laptop computer set up that will allow [the defendant] and the defense attorney to view the witness as well as a probably 20-some-odd-inch television screen that will allow them to view the witness as well and the jury can view the witness. And the feed allows the witness, based upon the way it's set up, to be able to see the person questioning him as well as the Defense counsel table. And the person questioning [WARD] is not blocking or impeding the witness's view of the counsel table where the Defense attorney Counsel and the Defense Attorney's assistant can be seen.
>
> And so that should allow for contemporaneous transmission and contemporaneous cross-examination and should allow the Defendant to be able to see the witness and the witness to be able to see the Defendant and the jury to be able to see the cross-examination and the witness contemporaneous with it taking place." Id. at 781 – 782.

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The Confrontation Clause reflects a preference for face-to-face confrontation at trial, but that preference must occasionally give way to considerations of public policy and the necessities of the case. The salutary effects of the face-to-face confrontation include (1) the giving of testimony under oath, (2) the opportunity for cross-examination, (3) the ability of the fact-finder to observe demeanor evidence, and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant

when testifying in his presence." Id. at 781 – 783 (citing Craig, 497 U.S. at 845 – 849). "The two-way closed-circuit television procedure utilized by the State to present WARD's testimony preserved all of these characteristics of in-court testimony: WARD was sworn; he was subject to full cross-examination; he testified in full view of the jury, trial court, and defense counsel; and he gave his testimony under the eye of [the defendant] herself. Here, WARD's tenuous health situation - - documented letters from his treating cardiologist - - was an exceptional circumstance that warranted permitting [WARD's] testimony by two-way closed-circuit television. And the set-up that the State employed **did not** deprive [the defendant] of her Sixth Amendment right to confront [the witness testifying against her]. Therefore, we hold that the trial court did not abuse its discretion by allowing WARD to testify via two-way closed-circuit television." Id. at 782 – 783.

In Bush v. Wyoming, 193 P.3d 203 (2008), cert. denied, 556 U.S. 1185 (2009), on the eighth day of trial, the State asked the trial court to allow testimony to be given by video teleconference. The State informed the trial court that one of its witnesses, MR. MARTIN, had suffered congestive heart failure one week before and was unable to travel from his home in Colorado to Wyoming. The State represented to the trial court that MR. MARTIN was seriously ill, and MRS. MARTIN was reluctant to leave him. The trial court **denied** the request, but

advised the State it would reconsider the issue if new information came to light. The following day, the State brought the matter of MR. MARTIN's testimony to the trial court's attention again. Based on the new information, the trial court ruled that it would allow the testimony of both MR. and MRS. MARTIN by video teleconference, finding that MR. MARTIN's condition was serious and severe and he should not travel. Id. at 214.

In deciding Bush, the Wyoming Supreme Court noted, "The Sixth Amendment protects the right of an accused to confront the witnesses against him. Generally, this means witnesses who testify against a defendant in a criminal proceeding must appear at trial. The right, however, is not absolute and may be compromised under limited circumstances. The confrontation clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case. We conclude the district court properly applied the Craig test and admitted MR. MARTIN's testimony by video teleconference and did not violate [the defendant's] confrontation right." Id. at 214 – 216.

In People v. Wrotten, 923 N.E.2d 1099 (2009), cert. denied, 560 U.S. 959 (2010), the Court of Appeals of New York was asked to determine whether the New York Supreme Court, Bronx County, erred in permitting an adult complainant living in another state to testify via real-time, two-way video. Prior to trial on the merits, after conducting a hearing on the complainant's health, the trial court held that the complainant - - at that time 85 years old, frail, unsteady on his feet, and with a history of coronary disease - - could not travel to New York without endangering his health, and was therefore unavailable. "At trial, the complainant testified live from a courtroom in California via two-way video, appearing 'on screen.' [The Complainant] stated that he could see the judge, prosecutor, defense counsel, defendant, and jury. The judge stated that the witness could be seen 'very clearly,' including 'any expressions on his face.'" Id. at 1100 – 1101.

On appeal in Wrotten, a divided New York Supreme Court, Appellate Division, **reversed** and **vacated** the conviction, holding that, in the absence of any express legislative authorization, the New York Supreme Court lacked authority to permit the admission of televised testimony. The dissent concluded the New York Supreme Court retained discretion under its inherent powers and Judiciary Law § 2-b (3) to utilize this new procedure without legislative authorization. A Justice of that court granted leave to appeal and we now **reverse**. Id. at 1101.

"Although the [New York] Legislature has primary authority to regulate court procedure, 'the Constitution permits the courts latitude to adopt procedures consistent with general practice as provided by statute.' By enacting Judiciary Law § 2-b (3), the Legislature has explicitly authorized the courts' use of innovative procedures where 'necessary to carry into effect the powers and jurisdiction possessed by [the court].' Thus, as we have acknowledged, courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law. There is **no** specific statutory authority evincing legislative policy proscribing televised testimony." Id.

"Live two-way video may preserve the essential safeguards of testimonial reliability, and so satisfy the Confrontation Clause's primary concern with 'ensur[ing] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' Id. (citing Craig, 497 U.S. at 845). Essential to the holding in Craig was that 'all of the other elements of the confrontation right' were preserved, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor as he or she testifies." Id. (citing Craig, 497 U.S. at 851).

"Live televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully. Televised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances. As the dissent below correctly noted, '[i]n the absence of direction from the Legislature, [New York] Supreme Court retained discretion…to determine what steps, if any, could be taken to permit this prosecution to proceed notwithstanding the complaining witness's inability to be physically present in the courtroom.' Accordingly, the order of the Appellate Division should be **reversed**…." Id. at 1103.

In her statement regarding the denial of the petition for Writ of Certiorari in Wrotten v. New York, Justice SOTOMAYOR wrote:

> "This case presents the question whether petitioner's rights under the Confrontation Clause of the Sixth Amendment, were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by Maryland v. Craig, 497 U.S. 836 (1990). We recognized in that case that 'a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial,' but 'only where denial of such confrontation is necessary to further an important public policy.' Id. at 850. 'In so holding, we emphasized that '[t]he requisite finding of necessity must of course be a case-specific one.' Id. at 855. Because the use of video

> testimony in this case arose in a strikingly different context than in Craig, it is not clear that the latter is controlling.
>
> The instant petition, however reaches us in an interlocutory posture. The New York Court of Appeals remanded to the Appellate Division for further review, including of factual questions relevant to the issue of necessity. Granting the petition for certiorari at this time would require us to resolve the threshold question whether the Court of Appeals' decision constitutes a '[f]inal judgmen[t]' under 28 U.S.C. § 1257 (a). Moreover, even if we found the judgment final, in reviewing the case at this stage would not have the benefit of the state court's full consideration. (citations omitted).
>
> In light of the procedural difficulties that arise from the interlocutory posture, I agree with the Court's decision to deny the petition for certiorari. But following the example of some of my colleagues, 'I think it appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning' the importance of the question presented." Wrotten, 560 U.S. at 959 (SOTOMAYOR, J., concurring) (citations omitted).

In Acevedo v. State, No. 05-08-00839-CR, 2009 WL 3353625 (Tex.App. - - Dallas October 20, 2009, pet. ref'd) (mem.op. not designated for publication), a jury convicted the appellant of Capital Murder, and the trial court imposed an automatic Life sentence. In his third issue, the appellant complains that the trial court erred in allowing his Sister (GABRIELLA ACEVEDO GARCIA, with a high-risk pregnancy) to testify from Chicago by way of a video conferencing system in violation of his Sixth Amendment right to confrontation.

In Acevedo, in a hearing outside the presence of the jury, "MIKE CARROLL, Director of Information Systems…described the two-way real-time video conferencing system used for GARCIA's testimony. CARROLL explained the system allowed GARCIA to testify at a laptop computer with a Web camera and microphone, use a secure Internet channel for audio and video communication, and allowed participants to hear, see, and react in real time. CARROLL… described the courtroom and said he could see the prosecutor, judge, and three persons seated at the defense counsel table. GARCIA confirmed that she could see the courtroom and, in particular, the appellant, while those in the Dallas courtroom were able to hear and observe GARCIA on a large screen." Id. at *6.

"At the conclusion of the hearing, the appellant objected to GARCIA testifying by video conferencing as a violation of his Sixth Amendment right to confrontation. The trial court **OVERRULED** the objection and made oral findings regarding both the video conferencing system and the need for it in this case. The trial court found the system allowed (1) contemporaneous transmission and cross-examination; (2) appellant to see GARCIA and GARCIA to see the attorneys for the State, appellant's attorney, and appellant himself; and (3) the jury to be able to observe GARCIA on a large screen, hear her testimony, and observe her demeanor." Id. at *7.

In Acevedo, "[T]he two-way video conferencing system preserved all of the other characteristics of in-court testimony. GARCIA was sworn and subject to full cross-examination by appellant. [GARCIA] testified in full view of the jury, trial court, defense counsel, and appellant himself. Finally, the jury was able to contemporaneously hear her answers while observing her mannerisms and demeanor. [T]he system used by the State **did not** deprive appellant of his Sixth Amendment rights." Id. at *8.

In Paul v. State, 419 S.W.3d 446, 459 (Tex.App. - - Tyler 2012, pet. ref'd), State's witness NONA JORDAN testified via computer video conferencing system that she "was able to see the prosecuting attorney, appellant's trial counsel, and appellant. The trial court found that there was contemporaneous transmission and cross-examination available, that appellant was able to see JORDAN, and that JORDAN was able to see the attorneys for the State, the attorney for appellant, and appellant himself. The court further found that the jury would be able to observe JORDAN on a large screen, hear her testimony, and observe her demeanor." Id. In **affirming**, the Court of Appeals held: "JORDAN was sworn; she was subject to full cross-examination; she testified in full view of the jury, the trial court, and defense counsel; and she gave her testimony under the eye of appellant himself." Id.

In Rivera v. State, 381 S.W.3d 710, 711 – 713 (Tex.App. - - Beaumont 2012, pet. ref'd), the appellant was convicted of Capital Murder and sentenced to Life without Parole. "The trial court allowed THOMAS TAYLOR [a Crime Scene Investigator], to testify using live videoconferencing because at the time of trial [TAYLOR] was on active duty in Iraq. The trial court OVERRULED [appellant's] Sixth Amendment and **Article 1, § 10** objections…. [Appellant] argues that the fact that TAYLOR was not present in the courtroom and appeared on a monitor reduced the visual impact of his testimony as compared to that given by a witness physically in the courtroom. Nevertheless, the system used in this case allowed the factfinder and attorneys to observe TAYLOR, preserving those aspects of confrontation. Also, TAYLOR testified under oath, and [appellant's] attorney cross-examined [TAYLOR]. [Appellant], the attorneys, and the jury, all present in the courtroom, could observe TAYLOR's demeanor while he testified. Finally, TAYLOR's testimony concerned his collection of prints from [the victim's] SUV, a detail that involved the routine investigation of the crime scene." Id. In **affirming,** the Court of Appeals declined to interpret Texas' Confrontation Clause to impose protections greater than the protections afforded a defendant under federal law. Id. at 713.

In Lara v. State, No. 05-17-00467-CR, 2018 WL 3434547 (Tex.App. - - Dallas July 17, 2018, pet. ref'd) (mem.op. not designated for publication), a jury convicted the appellant of Murder and sentenced him to Life in prison. On the second day of trial, the trial court conducted a hearing outside the presence of the jury on the State's motion to allow video telephonic testimony of a witness. During that hearing, the prosecutor informed the trial court that a State's witness, HERNANDEZ, had suffered a heart attack the previous night and was in the hospital. The prosecutor stated that HERNANDEZ was unable to come to court, but that she was able to testify via FaceTime, which would allow HERNANDEZ to see who was examining her, the defendant to see and confront her, and the jury to see HERNANDEZ and assess her credibility. Slip op. at*4.

The trial court granted the State's motion and administered the oath to HERNANDEZ. The trial court informed the jury HERNANDEZ was currently in the hospital and appearing by FaceTime and instructed the jury "not to let sympathy enter into play." Id. Here, the record reflects the witness was sworn after a connection between her and the FaceTime call was initiated and defense counsel was able to cross-examine her. The prosecutor began her examination of HERNANDEZ with: "the jury sees you on the TV screen. Do you see the jury sitting over in the box?" HERNANDEZ responded, "Yes." At the end of her

examination, the prosecutor asked HERNANDEZ to describe what the appellant was wearing, which she was able to do. At no point did appellant object that either he or the jury was unable to see HERNANDEZ. In **affirming**, the Court of Appeals held, "On this record, we conclude that the salutary effects of a face-to-face confrontation were preserved and that the trial court did not abuse its discretion by admitting HERNANDEZ's testimony via FaceTime." Id. at *5.

Here, SUZANNE DEVORE, a Sexual Assault Nurse Examiner, testified via FACETIME from Montana. Prior to testifying, DEVORE was sworn in by a NOTARY PUBLIC, State of Montana. During her testimony, DEVORE's live image was projected on the video screens located on Counsel table in front of both the Prosecutor and Defense Counsel; on the video screen located on the Trial Court's bench; and, projected on a 60-inch TV screen for the Jury. The Prosecutor, Defense Counsel and Appellant had a full opportunity to observe DEVORE; DEVORE was able to observe the questioner, be it the Prosecutor or Defense Counsel; Petitioner's Counsel was able to cross-examine DEVORE; and, DEVORE was in full view of the Jury at all times, for the Jury's consideration as to demeanor. (RPTR. REC. IV – 53 – 97). At the conclusion of DEVORE's testimony, Appellant made no objections as to the videoconferencing method utilized by the Trial Court to provide DEVORE's testimony.

Petitioner asserts that a constitutional error occurred during trial when DEVORE was permitted to testify via FACETIME from Montana. Petitioner asserts that once a constitutional error occurs at trial, the burden shifts to the State to prove beyond a reasonable doubt that the error did not "contribute to the verdict." Chapman v. California, 386 U.S. 18, 24 (1967). Petitioner asserts that a reviewing Court must entirely exclude DEVORE's testimony because "without [DEVORE's] testimony, the DNA evidence that she collected as the origin of the chain of custody was inadmissible. DEVORE was an essential witness because she was 'the beginning…of the chain of custody.'" (Petitioner's brief at 21).

The Ninth Court of Appeals, in its MEMORANDUM OPINION, stated,

> "After reviewing the entire record, we conclude that much of the SANE's testimony was cumulative of M.W.'s testimony, and the SANE was not a crucial identification or fact witness. The record demonstrates that the trial court permitted [Petitioner] to fully cross-examine the SANE. There was evidence introduced from M.W., L.B., and T.W., as well as from the forensic witnesses that corroborated the material points of the SANE's testimony, and the State's case was not dependent upon the SANE's testimony. M.W.'s testimony alone is sufficient to support [Petitioner's] convictions." Haggard, slip op. at 18.
>
> "Because our review of the record shows that the properly admitted evidence overwhelmingly established [Petitioner's] guilt, we conclude, beyond a reasonable doubt, that the admission of the SANE's testimony via live videoconferencing did not contribute to [Petitioner's] convictions." Haggard, slip op. at 19.

Generally, the erroneous admission of evidence constitutes non-constitutional error, subject to a harm analysis. Non-constitutional error requires reversal only if it affects the substantial rights of the accused. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. A reviewing court will not overturn a criminal conviction for non-constitutional error if, after examining the record, it has fair assurance that the error did not influence the jury, or had but a slight effect. (citations omitted).

If the erroneous admission of evidence constitutes a violation of constitutional rights, a reviewing court will still perform a harm analysis and must reverse a judgment of conviction unless it determines beyond a reasonable doubt that the error did not contribute to the conviction. **TEX. R. APP. PROC. 44.2 (a)**. "The critical inquiry is not whether the evidence supported the verdict absent the erroneously admitted evidence, but rather 'the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations.' A Confrontation Clause violation is constitutional error that requires reversal unless the reviewing court concludes beyond a reasonable doubt that the error was harmless." Lee v. State, 418 S.W.3d 892, 899 (Tex.App. - - Houston [14th Dist.] 2013, pet. ref'd).

When reviewing harm for violations of the Confrontation Clause, a reviewing court considers: (1) how important the out-of-court statement was to the State's case; (2) whether the out-of-court statement was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and (4) the overall strength of the prosecution's case. Henriquez v. State, 580 S.W.3d 421, 429 (Tex.App. - - Houston [1st Dist.] 2019, pet. ref'd). Applying the factors relevant to this error, this Court must conclude that said error did not materially affect the jury's deliberations. ACCORDINGLY, this Court should OVERRULE Petitioner's sole ISSUE.

CONCLUSION AND PRAYER

For the above stated reasons, the State of Texas prays that this Honorable Court of Criminal Appeals OVERRULE the Petitioner's ISSUE on Discretionary Review and AFFIRM the holdings of the Ninth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEPHEN C. TAYLOR, Assistant District Attorney, Liberty County, Texas, do certify that a true and correct copy of the State's Brief has been sent by U.S. mail to JOSH SCHAFFER, 1021 Main St., Suite 1440, Houston, Texas 77002 attorney for the Appellant, on this the 2nd day of December, 2019.

/S/ STEPHEN C. TAYLOR

STEPHEN C. TAYLOR

CERTIFICATE OF COMPLIANCE

I, STEPHEN C. TAYLOR, hereby certify that there are 12,830 words contained in this document.

/S/ STEPHEN C. TAYLOR

STEPHEN C. TAYLOR